IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-5800

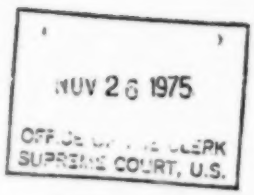
CARL RAY SONGER,

Petitioner,

VS.

STATE OF FLORIDA,

Respondent.



PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Florida entered on September 3, 1975.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is reported at ____So.2d____, Fla. Sup. Ct. No. 45,584 (September 3, 1975) (slip opinion), and is set out in Appendix A hereto, pp. 1a-7a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Florida was entered on September 3, 1975, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether the imposition and execution of the sentence of death for the crime of first degree murder under the law of Florida violates the Eighth or Fourteenth Amendments to the Constitution of the United States?

II. Whether nondisclosure of a "confidential" portion of a pre-sentence investigation report to a defendant convicted of a capital crime constitutes a denial of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments tc the Constitution of the United States and of the right to a fair hearing as guaranteed by the Due Process Clause of the Fourteenth Amendment when the trial judge imposes the death sentence partially on the basis of the pre-sentence report?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the statutes of Florida:

Fla. Stat. §755.082 (1973)
Penalties for felonies and misdemeanors

"(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).

(3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). . . ."

Fla. Stat. §782.04 (1973) 1/
Murder

"(1) (a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (17) years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §755.082.

(b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary,

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1/ This section was amended in 1974, and the statutory definition of second degree murder was altered slightly. Florida Laws 1974, c. 74-383, §14 (effective October 1, 1975) enacted a new §782.04, which provides:

"782.04 Murder

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person eighteen

1/ Cont'd.

years or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in chapter 775.

(b) In all cases under this section the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being when perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 755.

(3) When a person is killed in the perpetration of or in the attempt to perpetrate any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

(4) The unlawful killing of a human being when perpetrated without any design to effect death, by a person engaged in the perpetration of or in the attempt to perpetrate any felony, other than any arson, rape, sodomy,

kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in section 775.082, section 775.083, or section 775.084."

Fla. Stat. §782.07 (1973)
Manslaughter

"The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084."

Fla. Stat. §784.02 (1973)
Punishment for assault

"Whoever commits a bare assault is guilty of a misdemeanor and, upon conviction, shall be guilty of a misdemeanor of the second degree, punishable as provided in §775.082 or §775.083."

Fla. Stat. §784.03 (1973)
Punishment for assault and battery

"Whoever commits assault and battery is guilty of a misdemeanor and, upon conviction, shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."

Fla. Stat. §784.04 (1973)
Aggravated assault

"Whoever assaults another with a deadly weapon, without intent to kill, shall be guilty of an aggravated assault, and shall be guilty of a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084."

1/ Cont'd.

robbery, burglary, kidnapping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb, . . . shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in chapter 775."

Fla. Stat. §784.06 (1973)
Assault with intent to commit felony

"Whoever commits an assault on another, with intent to commit any capital felony or felony of the first degree shall be guilty of a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084. An assault with intent to commit any other felony constitutes a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084."

2/

Fla. Stat. §921.141 (1973)
Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

"(1) Separate proceedings on issue of penalty. Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 755.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7), of this section. [3/] Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury. After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist, and

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2/ Subsection (1) of this statute was amended slightly in 1974 by Fla. Laws 1974, c. 74-379 (effective October 1, 1974) to provide that if through "impossibility or inability" the trial jury is unable to reconvene for a hearing or sentencing, a special jury may be summoned.

3/ The subsection setting forth aggravating circumstances and mitigating circumstances in Fla. Stat. Ann. §921.141 (1974-1975 supp.), however, are numbered, respectively, (5) and (6).

(c) Based on these considerations, whether the defendant should be sentenced to life . . . or death.

(3) Finding in support of sentence of death. Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

(4) Review of judgment and sentence. The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances. -- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive-device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious or cruel.

(6) Mitigating circumstances. -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant, at the time of the crime."

Fla. Stat. §922.09 (1973)
Capital cases

"When a person is sentenced to death, the clerk of the court shall prepare a certified copy of the record to the governor. The sentence shall not be executed until the governor issues a warrant, attaches it to the copy of the record, and transmits it to the warden, directing him to execute the sentence at a time designated in the warrant."

Fla. Stat. §922.10 (1973)
Execution of death sentence

"A death sentence shall be executed by electrocution. The warden of the state prison shall designate the executioner. The warrant authorizing the execution shall be read to the convicted person immediately before execution."

Fla. Stat. §922.11 (1973)
Regulation of execution

"(1) The warden of the state prison or a deputy designated by him shall be present at the execution. The warden shall set the day for execution within the week designated by the governor in the warrant.

(2) Twelve citizens selected by the warden shall witness the execution. A qualified physician shall be present and announce when death has been inflicted. Counsel for the convicted person and ministers of the gospel requested by the convicted person may be present. Representatives of news media may be present under regulations approved by the head of the department of general services. All other persons except prison officers and guards shall be excluded during the execution.

(3) The body of the executed person shall be prepared for burial and, if requested, delivered at the prison gates to relatives of the deceased. If a coffin has not been provided by relatives, the body shall be delivered in a plain coffin. If the body is not claimed by relatives, it shall be given to physicians who have requested it for dissection or be disposed of in the same manner as are bodies of prisoners dying in the state prison."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Florida entered on

September 3, 1975, affirming petitioner's conviction of first degree murder and sentence of death. Petitioner Carl Ray Songer, an indigent white male, was sentenced to die by the Circuit Court for Osceola County on February 28, 1974, following his conviction of the murder of Ronald G. Smith, a trooper with the Florida Highway Patrol.

On December 23, 1973 five hunters were searching for their lost dogs in rural Citrus County, Florida. (R. 205, 224, 235, 269, 297, 298) The hunters were split into several groups.

About 6:00 a.m. two of the hunters saw an automobile with an Oklahoma tag parked about fifty yards off U.S. Highway 19 on a gravel top road. (R. 208, 215) When the two hunters first passed the car they thought that it might be abandoned because the motor was not running. (R. 215, 216, 228) However, the motor was running when the hunters returned a short time later. (R. 206) The hunters then approached the car and saw that it had two occupants. (R. 205, 219, 229, 230) The hunters awoke Ronald Jones who was asleep on the front seat and asked him about their dogs. (R. 206, 231) Jones said that he and his companion were waiting for a gas station to open because they were low on gas. (R. 207)

Petitioner was asleep on the rear seat covered by a jacket or blanket. (R. 206, 207, 226) Petitioner rolled over and pulled the blanket or jacket down a bit. Petitioner appeared to the hunters to be awake and listening, but he never sat up or said anything. (R. 222, 226, 233)

Two other hunters saw Trooper Smith on the gravel road about 8:30 to 9:00 a.m. (R. 236) They followed him down the road toward U.S. Highway 19, stopping when the trooper stopped near the Oklahoma car. (R. 236, 251, 254, 281) The hunters were between twenty and thirty-five feet behind the trooper's car and about sixty to seventy feet

from the Oklahoma car. (R. 255, 281)

Trooper Smith radioed his station at 8:52 a.m. to check on the Oklahoma tag. (R. 308) The dispatcher informed Smith at 8:59 a.m. that the car was not stolen. (R. 309)

The trooper put on his hat, unbuckled his gun, and approached the Oklahoma car with his hand on his pistol. (R. 237, 256, 257, 270, 282) He tapped on the front window, and Jones exited the car. The trooper made Jones go to the rear of the car and produce his identification; the trooper also searched and questioned Jones. (R. 237, 238, 271)

Trooper Smith then returned to the car with his hand on his pistol. (R. 238, 259) The observing hunters were unaware that anyone was in the rear seat of the automobile. (R. 260, 281) The officer had his hand on his gun and "lent forward like he was kind of going over to the back seat" as if "to wake up the other subject." (R. 271, 283) The shooting started a "split second" later. (R. 260)

The shots came in "a bunch of shooting" that "was all over within just a few seconds." (R. 238, 247, 299) The hunters could not clearly distinguish the shots from each other.[4/] (R. 247, 260, 285, 295) According to the hunters, the trooper was hit before he got his pistol out of his holster but was able to return fire. (R. 251, 268) All six shells in Smith's pistol were expended (R. 335), but the hunters thought that they could only distinguish two shots by the officer. (R. 251, 262) One hunter thought that the trooper was not shot after he discharged his weapon. (R. 250, 251) The officer was not shot after he fell, and all shooting by petitioner was from the car's rear seat.

4/ However, one hunter testified that petitioner fired three times and Smith fired twice. (R. 251)

(R. 263, 296)

Petitioner exited the car's back seat with a gun. (R. 239) The hunters told him to stop, and he fired at them. (R. 235, 239) Jones re-entered the car and attempted to drive away, but a hunter shot the car's tires. (R. 241) The same hunter shot Jones, and petitioner surrendered. (R. 242)

The hunters made Jones and petitioner "spreadeagle" face down on the ground. (R. 243) A hunter then called for assistance on the trooper's radio. (R. 244)

Petitioner testified that he and Jones left Oklahoma about the 19th or 20th of December. (R. 348) His weapon[5/] had been obtained in Oklahoma in exchange for drugs and was kept on the floorboard of the automobile. (R. 356, 357, 362) Petitioner and Jones drove to Miami, sleeping only in the car. (R. 349, 358) They only had two meals other than snacks. (R. 359) They left Miami in the afternoon of December 22 in order to return to Oklahoma for Christmas. (R. 350, 357, 358) Jones was driving, and petitioner was not aware when the car stopped on the gravel road. (R. 350) Petitioner recalled neither the hunters approaching the car nor hearing the trooper wake up Jones. (R. 351, 358)

Petitioner had been on drugs for four years and on his trip to Florida had taken "just various kinds, L.S.D., speed, marijuana." (R. 349) Petitioner's testimony about the shooting had a drug-like flavor as he testified:

> A. When I woke up, I thought I was falling, and seen an arm on my shoulder and it was pulling on me, pulling me over on the seat, and I was in the floor board and started shooting and a whole bunch of loud noises, hollaring and screaming

5/ Petitioner's pistol was a single action revolver. It was usually fired by first manually cocking the hammer, but it could also be fired rapidly by "fanning" the weapon. (R. 341)

> and then I was holding the gun, both hands, and then I was in the seat, and I heard Ronnie hollar and he kept saying 'look out', 'look out', and he said 'look out behind you', and I turned around and see the man with a rifle through the back glass, and I shot over my shoulder and got down in the floor board, and the next thing I knew I was outside the car, and I still had the gun in both hands looking at it and then Ronnie was there hollaring in my ear for me to run, and then, I don't remember throwing out the gun but I didn't have it, and I went out there with him and then I laid down out there with him 'cause he told us he was going to shoot us, and somebody stepped on my hand, and I was trying to look around and see what was going on and then they handcuffed me, and I thought we was in Oklahoma until I seen the emblem on the man's shirt.

Q Did you have any conversation with any body out there that morning?

A No, sir.

Q You heard Mr. Young and the gentlemen that was in the Air Force testify here today about them coming up to the car and so forth, do you have any recollection of them ever coming up to that car?

A No, sir.

Q Did you know that they ever come up to that car before you heard them today?

A No, sir.

Q You heard also Mr. Morris and Mr. Starling testify that you got out of the car, did you get out of that car?

A No, sir, the only time I was out of the car that I remember was when I was sitting there looking at the gun and I went out there where Ronnie was. That's the only time I can remember getting out.

Q How long had you been on drugs?

A About four years.

Q When you say you took speed, what is speed?

A Amphetammine, speed for blood circulation, makes you stay awake.

Q And how about L.S.D., what form did you use of L.S.D.?

A Tablets.

Q Did you know when you started the shooting out there, did you see anybody?

A I thought I seen a vision, it was a half of a person and arm is all I seen. That's what I seen.

Q Do you have any recollection of how many times you fired that gun?

A No, sir. I couldn't say.

Q Did you have any recollection of the officer firing the gun?

A No, sir.

Q Do you know whether or not he fired the gun?

A No, sir.

(R. 351-353)

Petitioner's pistol contained six empty cartridges. (R. 328) Three bullets fired by that weapon were recovered from the deceased's body. (R. 330) All six cartridges in the trooper's .357 magnum pistol had been fired (R. 335), and the trooper would not normally carry spent shells. (R. 305, 335)

A pathologist testified that he recovered three bullets from Smith's body. There were wounds in the trooper's chest, neck and inner surface of the left knee. (R. 315) The pathologist stated that four separate bullets were involved in the wounds in the deceased's upper body. (R. 318, 321) The pathologist ascribed death to "blood loss". (R. 316)

The prosecutor sought to rebut petitioner's testimony by having a deputy testify that he saw nothing to indicate that petitioner was under the influence of drugs. (R. 367) The deputy admitted that he had no conversations with petitioner (R. 358) and that petitioner was face down on the ground for most of the time the deputy saw him. (R. 368) The deputy concluded that the petitioner didn't appear to be under the influence of drugs because "I didn't observe

anything to indicate that he did or didn't". (R. 372)

The trial court instructed petitioner's jury that it could find him not guilty or guilty of first degree murder, second degree murder, third degree murder, or manslaughter. (R. 426, 427, 504) The jury convicted petitioner of first degree (premeditated) murder. (R. 431, 478)

The trial court conducted a sentencing hearing pursuant to the bifurcated process provided by Fla.Stat. 921.141.

Petitioner testified in mitigation that he was 23 years old. (R. 436) His mind was befuddled by drugs at the time of the homicide. He had steadily used drugs for the two months preceding the shooting. (R. 434) Petitioner stated that "since I had got on work release, every day and every night usually on the influence of [drugs]". (R. 437) He had taken his last dose of a drug south of the homicide scene on the trip from Miami back to Oklahoma. (R. 437) He was emotionally and physically run down due to lack of sleep and regular diet at the time of the homicide. (R. 434)

Petitioner's previous crimes involved no violence and were limited to two car thefts and one offense of uttering a forged instrument. (R. 433) He pled guilty in each instance. (R. 433)

In aggravation, an Oklahoma prison official testified that petitioner was on a work release program when he left Oklahoma. (R. 434)

On the evening of February 27, 1974 the jury recommended that petitioner be executed. (R. 449, 450, 479)

The trial court ordered a pre-sentence investigation report following the jury verdict of guilty on February 27,

974. (R. 431) The court noted its receipt of the pre-sentence investigation report the next day as well as receipt by trial counsel of "a copy of the portion thereof to which they are entitled." (R. 485) The court expressly considered "the factual information contained" in the report. (R. 485) The trial court entered its judgment and sentence and filed its written findings in support of the death sentence on February 28, 1974. (R. 485, 486)

On September 3, 1975, the Supreme Court of Florida affirmed petitioner's conviction and death sentence. Mr. Justice Powell subsequently stayed execution of the sentence to enable petitioner to petition for a writ of certiorari.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner moved in the trial court for a new trial and to have his sentence set aside because "the death penalty as authorized by [Fla. Stat. §921.141] and its implementing provisions" contravened Furman v. Georgia, 408 U.S. 238 (1972) and the Eighth and Fourteenth Amendments to the Constitution of the United States. (R. 523) The motion was denied, and petitioner assigned error on appeal as follows: "The court erred in sentencing defendant to death pursuant to Fla. Stat. §§775.082, 782.04, 921.141 because those statutes contravened the Florida and United States Constitutions by depriving defendant of due process and equal protection of the laws and by providing for cruel and unusual punishment in authorizing the death sentence of defendant; The court erred in denying defendant's motion for new trial." Assignment of Error Nos. 13, 14. (Supplemental Record 2) The issue was briefed and argued. Songer

v. State, Fla. Sup. Ct. No. 45,584, Brief of Appellant at 43-47. The Florida Supreme Court rejected this claim:

> "In his final point on appeal, Appellant requests this Court to reconsider its decision in Dixon on two grounds, i.e., that the procedure by which he was condemned to death is unconstitutionally discretionary and that the death penalty is per se cruel and unusual punishment and, therefore, unconstitutional. We disagree. In our view, the reasoning in Dixon answers these objections, and we find no cause for receding therefrom." (footnotes omitted)

Songer v. State, Fla. Sup. Ct. No. 45,584 (September 3, 1975), slip op. at 7, App. A, infra at 7a.

II. Petitioner assigned as error on appeal the court's "ordering and considering [of] the pre-sentence investigation of defendant." Assignment of Error No. 10 (Supplemental Record 2). The Florida Supreme Court rejected this claim:

> "As for Appellant's objection to the trial court's consideration of the presentence investigation report, we find no error in that consideration, which in fact is authorized by Rule 3.710, Rules of Criminal Procedure, that supplements Section 921.141, Florida Statutes. We observe that Appellant did not object to such consideration and that he received a copy of the PSI and had the opportunity to rebut it prior to sentencing. While it is true that Section 921.141, Florida Statutes, does not provide specifically for the consideration of a PSI report, it is our view that the statute should not be so strictly construed as to prevent the consideration of a document authorized by the Rules to be considered." (footnote omitted)

Songer v. State, Fla. Sup. Ct. No. 45,584 (September 3, 1975), slip op. at 5, 7; App. A, infra, at 5a, 7a. The court overlooked the trial court's limiting disclosure of the report to only that part of the report to which the trial judge thought the defense was "entitled". (R. 485) Cf. Gardner v. State, 313 So.2d 675, 678 (Fla. 1975) (Ervin, Jr., dissenting).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF FLORIDA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner adopts point I of the "Reasons for Granting the Writ" section of the Petition for Writ of Certiorari to the Supreme Court of Florida, Hallman v. Florida, No. 74-6168 (filed March 11, 1975) (attached as App. B, infra).

Gilford v. State, 313 So.2d 729 (Fla. 1975), which was decided subsequently to the filing of the Hallman petition, is not discussed in the Hallman petition. Gilford, however, does not detract from the argument in Hallman that Florida's capital sentencing procedure is unconstitutionally discretionary. Indeed, Gilford cements the inevitability that Florida juries sitting on first degree murder cases will have uncontrolled discretion, as in the instant case,[6/] to return verdicts of the several degrees of homicide recognized in Florida regardless of the evidence in any particular case. Gilford, supra, at 733.

The arbitrariness of Florida's capital sentencing procedure is further demonstrated by the case sub judice. The court agreed with the jury's recommendation of a death sentence, but it could have as easily rejected the recommendation and sentenced petitioner to life imprisonment. No guidelines would control the judge's decision, and the decision would not be subject to appellate review. Similarly,

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6/ Petitioner was tried before Gilford was decided; accordingly, Brown v. State, 206 So.2d 377 (Fla. 1968) dictated that petitioner's jury be given the choice of returning verdicts of not guilty or guilty of first, second, or third degree murder and manslaughter.

the court could accept or reject a jury's recommendation of mercy.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER NONDISCLOSURE OF A "CONFIDENTIAL" PORTION OF A PRE-SENTENCE INVESTIGATION REPORT TO A DEFENDANT CONVICTED OF A CAPITAL CRIME CONSTITUTES A DENIAL OF THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND OF THE RIGHT TO A FAIR HEARING AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WHEN THE TRIAL JUDGE IMPOSES A DEATH SENTENCE PARTIALLY ON THE BASIS OF THE PRE-SENTENCE REPORT.

Petitioner adopts point II of the "Reasons for Granting the Writ" section of the petition for Writ of Certiorari to the Supreme Court of Florida, Gardner v. Florida, No. 74-6593 (filed May 24, 1975) (attached as App. C, infra.)

Both petitioner and the petitioner in Gardner were sentenced by the same trial judge,[7/] and the procedure of non-disclosure of the "confidential" portion of a pre-sentence investigation report is markedly similar in the two cases.

One distinction between the instant case and Gardner is that the jury recommended mercy in Gardner but death in this case. That difference is without import since the trial judge had complete discretion to override any sentencing recommendation of the jury in either case. Since the trial court expressly relied in part on the pre-

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7/ The Honorable John W. Booth, Circuit Judge of the Fifth Judicial Circuit of the State of Florida.

sentence investigation report, its non-disclosure of the portion of the report to which, in the court's opinion, petitioner's counsel was not "entitled" was as much a deprivation of the effective assistance of counsel and due process in the trial below as in Gardner.

CONCLUSION

Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

JAMES A. GARDNER, PUBLIC DEFENDER
TWELFTH JUDICIAL CIRCUIT OF FLORIDA

By _____
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ATTORNEYS FOR PETITIONER

ORIGINAL COPY

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975
No. 75-5800

CARL RAY SONGER,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO State of Florida
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

ROBERT L. SHEVIN
ATTORNEY GENERAL

GERALD L. KNIGHT
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THE CAPITOL
TALLAHASSEE, FLORIDA 32304

COUNSEL FOR RESPONDENT

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TOPICAL INDEX

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975
No. 75-5800

CARL RAY SONGER,
Petitioner,

-vs-

STATE OF FLORIDA,
Respondent.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Florida sought to be reviewed is Songer v. State of Florida, ___So.2d___, Case No. 45,584 (Fla.Sup.Ct., September 3, 1975) (Exhibit I).

JURISDICTION

Respondent concedes that jurisdiction is properly being sought pursuant to 28 U.S.C. §1257(3) and to the extent that substantial federal questions are presented, this Court can exercise jurisdiction.

QUESTIONS PRESENTED

The questions posed by Petitioner at page two of his petition are acceptable to Respondent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees that the constitutional and statutory provisions which may be involved in the cause are as Petitioner represents in his petition at pages three through eight.

STATEMENT OF THE CASE AND FACTS

Upon his conviction of murder in the first degree, Petitioner was adjudicated guilty of murder in the first degree and sentenced to death by the Circuit Court of the Ninth Judicial Circuit of Florida, in and for Osceola County, Florida. On direct appeal to the Supreme Court of Florida, the Circuit Court's judgment and sentence of Petitioner were affirmed. Petitioner now brings a petition for writ of certiorari in this Court to review the decision of the Supreme Court of Florida entered on September 3, 1975. Respondent accepts the statement of the facts of this case as set out at pages one through three of the opinion of the Florida Supreme Court. (Exhibit I)

REASONS WHY THE WRIT SHOULD ISSUE

Respondent agrees that a writ of certiorari should issue on the basis of the first question raised by Petitioner, but does not agree that a writ should issue on the basis of the second question.

POINT I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH

FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF FLORIDA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

In light of the questions left unanswered by this Court in Furman v. Georgia, 408 U.S. 238 (1972), and the recent action taken in Fowler v. North Carolina, Case No. 73-7031 restoring said case to the oral argument calendar, 43 L.W. 3674, June 23, 1975, it would be frivolous for the undersigned counsel or the State of Florida to suggest that this case does not present a substantial federal question with regard to the validity of Florida's death penalty statute and the sentence imposed herein pursuant thereto.

Accordingly, the State of Florida concedes that this federal question, duly raised and passed upon by the Supreme Court of Florida, requires consideration by this Court so that it may authoritatively dispose of the merits of this issue. It should be noted that the position of the State of Florida is, and will be, that the statutes involved and the judgment and sentence entered in accordance therewith are valid in all respects.

Respondent respectfully urges this Court to accept jurisdiction as to this question; to enter an order directing the parties to file their respective briefs on the merits; and to set the cause for oral argument before the court during the October term.

POINT II

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER NONDISCLOSURE OF A

"CONFIDENTIAL" PORTION OF A PRESENTENCE INVESTIGATION REPORT TO A DEFENDANT CONVICTED OF A CAPITAL OFFENSE CONSTITUTES A VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

Petitioner contends that the trial judge erred in not disclosing to him the full contents of the presentence investigation report which the trial judge considered prior to imposing the death penalty on Petitioner. Petitioner suggests that such nondisclosure constitutes a violation of the right to counsel and due process as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, respectively. However, the record does not reveal that Petitioner objected in the trial court to the "limited disclosure" of the presentence investigation report. Moreover, an examination of Petitioner's assignments of error (attached as Exhibit II) and appellate briefs (a portion of which is attached as Exhibit III) reveal that this constitutional question was never raised in the Supreme Court of Florida. Accordingly, this Court is without jurisdiction to consider Petitioner's second question. See Cardinale v. Louisiana, 394 U.S. 437 (1969), in which it is stated that:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet 368, 9 L. Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet 368, 391, 9 L Ed 458, 467. The Court has consistently refused to decide federal constitutional issues raised

here for the first time on review of state court decisions both before the Crowell opinion, Miller v. Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), and since, e. g. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); [other citations omitted].

"In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 USC §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio, 385 US 92, 17 L Ed 2d 189, 87 S Ct 252 (1966), they should be given the first opportunity to consider them."

As to the issues which Petitioner did present to the Supreme Court of Florida, the only question relating to the presentence investigation report was whether the trial judge's consideration of that report was in violation of a state statute and state rule of criminal procedure pertaining to sentencing proceedings in capital cases. To the extent that this question may involve constitutional considerations, it has been previously answered in principle by this Court in Williams v. New York, 337 U.S. 241, 252 (1949). There, it was concluded that:

> "We cannot say that the due-process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence."

Cf. Rule 32 (c)(2), Federal Rules of Criminal Procedure; Gregg v. United States, 394 U.S. 489 (1969); United States v. Frontero,

452 F.2d 406, 410 (5th Cir., 1971).

CONCLUSION

Point I involves a substantial federal question which merits review by this Court. Point II involves a federal question which was never raised or decided in the Supreme Court of Florida. Thus, this Court does not have jurisdiction as to Point II, and review in this case if granted, should be limited to a consideration of the constitutionality of the death penalty statutes of the State of Florida.

Respectfully submitted,

ROBERT L. SHEVIN
ATTORNEY GENERAL

Gerald D. Knight

GERALD L. KNIGHT
ASSISTANT ATTORNEY GENERAL

THE CAPITOL
TALLAHASSEE, FLORIDA 32304

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to the Petition for Writ of Certiorari to the Supreme Court of Florida has been forwarded to Petitioner's Counsel, Charles H. Livingston, Esquire, Special Assistant Public Defender, 2168 Main Street, Sarasota, Florida, 33577, by mail, this 31st day of December, 1975.

Gerald D. Knight

OF COUNSEL

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, 1975

CARL RAY SONGER, a/k/a ROBERT BERRY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 45,584

Circuit Court Case No. 74-27

* * * * * * * * * * * * * * * * * *

Opinion filed September 3, 1975

An Appeal from the Circuit Court in and for Osceola County, John W. Booth, Judge

James A. Gardner, Public Defender; and Charles H. Livingston, Special Assistant Public Defender, for Appellant

Robert L. Shevin, Attorney General; and Gerry B. Rose, Assistant Attorney General, for Appellee

CREWS, JOHN J, Circuit Judge.

This cause comes before this Court on direct appeal from a conviction of murder in the first degree and a sentence of death imposed on Appellant in the Circuit Court of Osceola County. Jurisdiction vests in this Court pursuant to Article V, Section 3(b)(1), Florida Constitution. The facts of the cases are as follows.

At approximately 6:00 A.M. on the cold morning of December 23, 1973, hunters looking for dogs observed an automobile with its motor running, parked on a gravel road about fifty yards from U. S. Highway 19 near Crystal River, in Citrus County, Florida. They approached the car, knocked on the window of the passenger side and spoke to one, Ronald Jones, who raised up from a prone position on the front seat. The Appellant was lying down on the

rear seat with his face toward the front. Although he did not sit up or speak to them, Appellant's eyes were opened and he appeared to be listening to the conversation about dogs going on between one of the hunters, in the presence of the other, with Jones.

Between 8:30 and 9:00 A.M. two other hunters were about thirty feet behind Trooper Ronald G. Smith of the Florida Highway Patrol when he stopped to check the parked vehicle. These hunters saw Smith approach the car, talk with Jones, search Jones at the rear of the auto, and return to the car with his hand on his pistol. Thereupon, Smith leaned into the car. Suddenly, a fusillade of shots occurred, after which the officer was dead (death resulted from a loss of blood due to four bullet wounds in deceased's upper body plus a wound in one knee). The Appellant came out of the back seat of the automobile, shot once toward the hunters, jumped back inside the car and with Jones driving, attempted to make his getaway.

One of the hunters, armed with a 308 semi-automatic rifle, shot certain tires out on the moving automobile causing it to stop. Its occupants attempted to escape by running, but after Jones was shot in the foot by one of the hunters, the Appellant advisedly surrendered, holding his hands with his pistol in one over his head and upon being so ordered, tossed the pistol over the car. The hunters then called for help on the Trooper's radio.

Appellant testified at trial that, at the time of the shooting, he was under the influence of drugs and that he woke to find a "vision"--an arm that was pulling him,--so he rolled to the floor of the car where he got his single action gun and fired repeatedly at the vision. After the shooting, it was found that Appellant's gun contained six empty cartridges, while all six cartridges in Trooper Smith's pistol had also been fired.

At the jury trial which was held for the 23-year-old Appellant, a pathologist testified regarding the location of certain bullet wounds, and later, in his closing argument, the prosecutor referred to certain pathological evidence to convince

the jury of Appellant's guilt. The jury returned a verdict of guilty of premeditated murder with a recommendation that Appellant be executed. The trial court entered its written Findings of Fact in support of the death penalty and sentenced Appellant to be electrocuted. In its Findings of Fact, the court relied on a Presentence Investigation Report (PSI) which showed that Appellant had committed various non-violent crimes (two instances of auto theft and one forged check case) and concluded that there were aggravating, rather than mitigating, circumstances in this fatal shooting.

While Appellant admits that he is guilty to some degree of homicide, he questions the sufficiency of the circumstantial evidence sub judice to support a finding of premeditation.[1] Appellant further concedes that the duration of the premeditation is immaterial so long as the murder results from a premeditated design existing at a definite time to murder a human being;[2] nevertheless, he argues that the evidence shows that he was surprised when suddenly awakened by the trooper and that he was so intoxicated by drugs that he could not form the mental state required to premeditate the shooting.[3] Based on this reasoning, Appellant concludes that the evidence is legally insufficient to support a jury verdict of first degree murder. We disagree. The record shows: that Appellant had absconded from the Oklahoma authorities, and, logically, could have been avoiding arrest; that the trooper leaned over the front seat to wake a supposedly sleeping person; that Appellant was sufficiently alert to accurately shoot the trooper four out of four shots from a single-action pistol which he had to "fan"

[1] Hill v. State, 133 So.2d 68 (Fla. 1961); Thompson v. State, 276 So.2d 218 (Fla. App. 1973), cert. den. 281 So.2d 210.

[2] Snipes v. State, 154 Fla. 262, 17 So.2d 93 (1944).

[3] Britts v. State, 158 Fla. 839, 30 So.2d 363 (1947).

for rapid fire--while lying on the floor of the back seat of the automobile; that the trooper suffered multiple wounds in such rapid succession that he did not have time to take defensive action until he had been shot at least once; and that there was testimony that contradicted Appellant's contention that he was under the influence of drugs. This meets with criteria relating to premeditation that was suggested in Larry v. State.[4] Recognizing the established principle that, where a jury's verdict is supported by competent substantial evidence, an appellate court should not substitute itself as the trier of the fact,[5] we accept the jury's evaluation of the evidence; in doing so, we specifically reject Appellant's contention that a defendant's interpretation of circumstantial evidence should be accepted completely unless it is specifically contradicted.

We also reject Appellant's contention that remarks made by the prosecutor in closing argument constitute reversible error. Certain statements, though incorrectly attributed by the State Attorney to the pathologist, did have a basis in the trial record. Furthermore, Appellant is precluded from asserting this argument since he failed to object at trial to the allegedly improper prosecutorial comment.[6] Moreover, the prosecutor's possibly inappropriate use of medical terminology, and the conflicts concerning the angles of the wounds and size of neck wound are not such decisive factors that would justify, not to mention, require a finding of fundamental error by this Court.

When the death penalty has been imposed, this Court has a separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted.[7] An examination of the record in this case discloses the following aggravating

[4] 104 So.2d 352 (Fla. 1958).

[5] Harrell v. State, 245 So.2d 302 (Fla. App. 1971).

[6] State v. Jones, 204 So.2d 515 (Fla. 1967).

[7] State v. Dixon, 283 So.2d 1 (Fla. 1973) U.S. cert. den. in consolidated case (Hunter), 40 L.Ed.2d 295.

circumstances as recognized by statute:[8] (1) at the time he killed the patrolman, Appellant was under a three-year sentence of imprisonment for the larceny of an automobile; (2) while serving such sentence, Appellant escaped from the Oklahoma prison system and, at the time of the fatal shooting, was a fugitive from the law; (3) Appellant shot Trooper Smith while he was in uniform, on active duty, and making a routine inspection of an apparently abandoned vehicle, all of which was a lawful exercise of a governmental function. In relating the statutorily enumerated mitigating circumstances[9] to the instant case, even Appellant admits that there are only three which possibly apply, i.e., youth, intoxication and insignificant prior history of criminal activity. We have supplied these standards to Appellant and have found them to be inapplicable: (1) youth: Appellant is 23 years old, and today one is considered an adult responsible for one's own conduct at the age of 18 years; (2) intoxication: there is sufficient evidence to justify the jury's finding that Appellant was not so intoxicated as to be unaware of what he was doing; and (3) Appellant's three prior felony convictions which fall between the extremes mentioned in Dixon[10] and which are not so insignificant as to ignore them. Thus, we agree with the trial court that there are no mitigating circumstances sub judice.

As for Appellant's objection to the trial court's consideration of the presentence investigation report, we find no error in that consideration, which in fact is authorized by Rule 3.710, Rules of Criminal Procedure, that supplements Section 921.141, Florida Statutes. We observe that Appellant did not object to such consideration and that he received a copy of the PSI and had the opportunity to rebut it prior to sentencing

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[8] Section 921.141(3), Florida Statutes, now Section 921.141(5), Florida Statutes.

[9] Section 921.141(4), Florida Statutes, now Section 921.141(6), Florida Statutes.

[10] See Note 7, supra.

While it is true that Section 921.141, Florida Statutes, does not provide specifically for the consideration of a PSI report, it is our view that the statute should not be so strictly construed as to prevent the consideration of a document authorized by the Rules to be considered.[11]

In his final point on appeal, Appellant requests this Court to reconsider its decision in Dixon[12] on two grounds, i.e., that the procedure by which he was condemned to death is unconstitutionally discretionary and that the death penalty is per se cruel and unusual punishment and, therefore, unconstitutional.[13] We disagree. In our view, the reasoning in Dixon answers these objections, and we find no cause for receding therefrom.

The Appellant having failed to demonstrate reversible error, his conviction for murder in the first degree and sentence of death are hereby affirmed.

It is so ordered.

ADKINS, C.J., ROBERTS and OVERTON, JJ.; and LEE and McCRARY, Circuit Judges, Concur

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[11] Cf. Davis v. State, 297 So.2d 289 (Fla. 1974).

[12] See Note 7, supra.

[13] Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 246, 92 S.Ct. 2726 (1972).

IN THE CIRCUIT COURT, IN AND FOR OSCEOLA COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

CASE NO. 74-27

VS.

CARL RAY SONGER, a/k/a
ROBERT BERRY,

Defendant.

ASSIGNMENTS OF ERROR

Defendant, Carl Ray Songer, a/k/a Robert Berry, by and through his undersigned counsel, files these assignments of error intended to be relied upon in the Supreme Court of Florida as follows:

1. The verdict is contrary to law.

2. The verdict is against the manifest weight of the evidence.

3. The verdict is contrary to law and against the manifest weight of the evidence.

4. The court and the clerk of the court erred in administering the oath to potential jurors on voir dire examination by giving the wrong oath and then subsequently regiving the appropriate oath after voir dire questions had been propounded and, further, by then administering additional oaths to each of the prospective jurors as each was called for voir dire examination.

5. The court erred in denying defendant's motion for a judgment of acquittal as to first degree murder.

6. The court erred by permitting the prosecutor to read in closing argument from the pathologist's report because the pathologist's report was not in evidence.

7. The court erred in instructing the jury about the legal requirements of circumstantial evidence.

EXHIBIT II

8. The court erred in entering judgment of first degree murder against the defendant.

9. The court erred in rendering its findings of fact in support of the death penalty because the court considered factors not based upon the record of the trial and the sentencing proceedings in contravention of Fla. Stat. §921.141(3).

10. The court erred in ordering and considering the pre-sentence investigation of defendant.

11. The court erred in ignoring mitigating circumstances specified in Fla. Stat. §921.141(7).

12. The court erred in determining that there were no mitigating circumstances in its findings of fact in support of defendant's death sentence.

13. The court erred in sentencing defendant to death pursuant to Fla. Stat. §§775.082, 782.04, 921.141 because those statutes contravened the Florida and United States Constitutions by depriving defendant of due process and equal protection of the laws and by providing for cruel and unusual punishment in authorizing the death sentence of defendant.

14. The court erred in denying defendant's motion for new trial.

Respectfully submitted,

Charles H. Livingston

CHARLES H. LIVINGSTON
Assistant Public Defender
Room 200 West, Courthouse
Sarasota, Florida

and were not aggravating crimes such as armed robbery, assault with intent to murder, aggravated assault or rape.* The non-violent nature of appellant's past criminality was thus a clearly proven mitigating circumstance.

A trial court must not impose a death sentence without "weighing the aggravating and mitigating circumstances". Fla. Stat. §921.141(3). Mitigating circumstances, like aggravating ones, must be viewed "in light of the totality of the circumstances present". Dixon v. State, supra at 10. Accordingly, proof of mitigating circumstances cannot be ignored. The court's failure to even consider, weigh or recognize the mitigating circumstances in this case taints the entire sentencing proceeding and requires reversal of appellant's sentence.

B

A SENTENCING COURT CANNOT PROPERLY CONSIDER A PRE-SENTENCE INVESTIGATION REPORT IN A CAPITAL CASE, ESPECIALLY WHEN THE PRE-SENTENCE INVESTIGATION REPORT IS NOT AVAILABLE FOR REVIEW BY THIS COURT.

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*Had appellant's prior criminal history been significant in terms of violence, the state would surely have presented that record as an aggravating circumstance pursuant to Fla. Stat. §921.141(6)(b)

EXHIBIT III

A sentencing court's written findings of fact are to be "based upon the circumstances in sub-sections (6) and (7) and based upon the records of the trial and the sentencing proceedings". Fla. Stat. §921.141(3). Fla. Stat. §921.141(6) provides that "aggravating circumstances shall be limited to" the enumerated aggravating circumstances. And this court has held that the purpose of the statute is to require the sentencing judge "to view the issue of life or death within the framework of rules provided by the statute". The statute, however, does not mention pre-sentence investigation reports anywhere. Both Dixon, supra and Taylor, supra, also fail to mention the use of any pre-sentence investigation reports.

Nonetheless, the court below immediately ordered a pre-sentence investigation report following the jury verdict of guilty. (R. 431) The court noted receipt of a pre-sentence investigation report on the defendant the next day (R. 485) as well as receipt by trial counsel for the state and appellant of "a copy of that portion thereof to which they are entitled". (R. 485) See also R. 450. The court expressly reviewed "the factual information contained in said pre-sentence investigation." (R. 485)

The court's consideration and review of the p.s.i. report invalidated the sentence in this cause by taking the sentencing process out of the bounds established by Fla. Stat. §921.141.

The p.s.i. report is not available for the record [see footnote p. 33 above] and cannot be reviewed by appellant, his counsel, or, more importantly, this Court. Consequently, the judicial review established by Fla. Stat. §921.141 and emphasized by this court in Dixon is impossible. Moreover, the allegations contained in the p.s.i. report are subject to no standard of proof even though aggravating circumstances "must be proved beyond a reasonable doubt before being considered" by a sentencing judge. Dixon, supra at 9.

Fla. R. Cr. P. 3.710 does not pertain to the instant case because the rule is designed for cases in which "the court has discretion as to what sentence may be imposed". Fla. R. Cr. P. 3.710; see also 1972 Committee Note to Fla. R. Cr. P. 3.710. Since the only discretion afforded a judge in a capital case is whether to order death pursuant to Fla. Stat. §921.141 or life imprisonment as afforded by Fla. Stat. §775.082, the usual discretion available to the Parole and Probation Commission and a sentencing judge does not exist in capital cases.

Appellant's trial counsel did not object to the ordering or consideration of the pre-sentence investigation report, but a judicial error which might well be a deciding factor in a death case is reviewable as fundamental error despite the failure to object. (F.A.R. 3.7i, 6.16a). Further, Fla. Stat. §921.141

in providing for an automatic and meaningful review by this court of a capital conviction and sentence mandated meaningful review of the sentencing proceedings regardless of trial counsel's failure to timely object to serious error.

The court's careful consideration of the factual allegations in the p.s.i. report was not founded on either the statute or State v. Dixon, supra. The court's utilization of the p.s.i. report thereby fatally tainted this capital proceeding.

IV

THE IMPOSITION OF A DEATH SENTENCE PURSUANT TO FLA. STAT. §§775.082, 782.04 AND 921.141 CONTRAVENES THE UNITED STATES AND FLORIDA CONSTITUTIONS.*

Appellant respectfully requests this court to reconsider State v. Dixon, supra. Appellant urges reconsideration on two grounds: the procedure by which appellant was condemned to death is unconstitutionally discretionary; and the death penalty is per se cruel and unusual.

*Raised by assignment of error 13:
"13. The court erred in sentencing defendant to death pursuant to Fla. Stat. §§775.082, 782.04, 921.141 because those statutes contravened the Florida and United States Constitutions by depriving defendant of due process and equal protection of the laws and by providing for cruel and unusual punishment in authorizing the death sentence of defendant."